

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8237
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OSCAR ROGELIO SANDOVAL-TAFOYA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP 92 CR 6 2)

(March 17, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

A jury convicted appellant Sandoval-Tafoya on four counts of violations involving the importation of marijuana in a white GEO metro coupe that crossed the border at El Paso, Texas in November 1991. In a border search, the drug was uncovered secreted by a trap door found under the carpet in the car trunk. Sandoval-Tafoya was not the driver of the auto. At the time of his arrest,

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

however, he admitted he knew there was marijuana in the car and that he had been promised \$1,000 for its delivery into the United States. He was sentenced to a 41-month term of imprisonment.

On appeal, Sandoval-Tafoya first contends that the district court permitted a violation of Fed. R. Evid. 615 by permitting U.S. Marshal Fernando Karl, a government rebuttal witness, to remain in the courtroom during rebuttal testimony of the defense witness whose statement he had impeached. This argument arises in a strange procedural posture, because Sandoval-Tafoya had not earlier insisted on Officer Karl's exclusion pursuant to defense counsel's invocation of Rule 615, requiring sequestration of witnesses, at the beginning of trial. Of course, it was not earlier known that Officer Karl would be a government witness. The government called Officer Karl only after Sandoval-Tafoya's co-defendant Corral, who had pled guilty, unexpectedly decided to testify for the defense and tried to exonerate Sandoval-Tafoya by asserting that he had no knowledge of the concealed marijuana. Officer Karl was the U.S. Marshal who had escorted co-defendant Corral to court. After Corral's exculpatory testimony, Officer Karl was called as a government rebuttal witness to testify that Corral had told him as they journeyed to the courthouse that he (Corral) intended to "help out" his friend Sandoval-Tafoya.

Responding to Officer Karl's rebuttal, defense counsel re-called Corral to the stand, and as he did so, he invoked the Rule, requesting that Officer Karl be sequestered. The court denied his request, and commented that Officer Karl had an

important duty to perform, in escorting Corral to and from the courthouse.

How these events constitute a violation of the rule of sequestration of witnesses is unclear. The ordinary purpose of the rule is to prevent witnesses from shading their testimony to that of witnesses they have already heard in the courtroom. United States v. Wylie, 919 F.2d 969, 976 (5th Cir. 1990). As Sandoval-Tafoya's brief acknowledges, the government could hardly have foreseen that Officer Karl would have testimony to offer until after co-defendant Corral had tried to exonerate appellant by his testimony. Peculiarly, Sandoval-Tafoya argues instead that Officer Karl's testimony was somehow bolstered when he was permitted to remain in the courtroom, in performance in his U.S. Marshal duty, during Corral's rebuttal testimony. We fail to see how his presence at that time violated the purpose of Rule 615, since there was no longer an opportunity for Officer Karl to shade his testimony. Further, we will not overrule the district court's refusal to sequester unless it constituted an abuse of discretion. United States v. Ortega-Chavez, 682 F.2d 1086, 1089-90 (5th Cir. 1982). Whatever small prejudice there might have been from allowing Officer Karl to remain in the courtroom was more than outweighed by his official duties and by the incriminating evidence of Sandoval-Tafoya's and Corral's earlier statements indicating that Sandoval-Tafoya knew there was marijuana in the car Corral was driving.

Sandoval-Tafoya next argues that the district court made several prejudicial remarks throughout the course of the trial that interfered with his rights to counsel and a fair trial. Inasmuch as counsel did not object to any of the district court's statements at trial, we may review these complaints only for plain error. Plain error is a mistake that seriously affects the fairness or integrity of the proceedings and results in a miscarriage of justice. United States v. Hatch, 926 F.2d 387, 394 (5th Cir.), cert. denied, 111 S. Ct. 2239 (1991). The court has carefully reviewed the trial court's remarks now objected to by Sandoval-Tafoya and has considered them in the full context of the proceedings. It is unnecessary to rehash each of these statements cited in appellant's brief. Suffice it to say that our review reveals neither the intemperance nor serious prejudice from these isolated remarks that would have affected the integrity of the proceedings or risen to the level of plain error.

The judgment of the district court is AFFIRMED.